



# Government Investigations & White Collar Defense Alert

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## D.C. Circuit sharpens definition of honest services fraud

By D. Grayson Yeargin, Emily Crandall Harlan, and Anthony Chavez

On January 25, 2013, the D.C. Circuit Court of Appeals breathed new life into the honest services statute, 18 U.S.C. § 1346, when it held that an implicit *quid pro quo* and a mere offer of a bribe, even without acceptance, can sustain an honest services fraud conviction.

In *United States v. Ring*, D.C. Cir. No. 11-3100, the court considered an appeal brought by Kevin Ring, a lobbyist and former associate of Jack Abramoff. In 2010, Mr. Ring was convicted on five counts including honest services fraud, paying an illegal gratuity, and conspiracy to commit those offenses. At trial, the government offered evidence that Mr. Ring had provided meals, tickets, and travel to public officials that were impermissibly linked to official acts that benefitted Mr. Ring and his clients.

Mr. Ring's 2010 trial arose just months after the Supreme Court's landmark holding in *Skilling v. United States*, 130 S. Ct. 2896 (2010), in which the Court limited the honest services fraud statute to bribery and kickback schemes as opposed to "undisclosed self-dealing by a public official or private employee." As such, the prosecutors in the case against Mr. Ring had to prove that his acts satisfied the elements of bribery—in other words, that Mr. Ring gave gifts with the intent to influence an official act, by way of a *quid pro quo*. The district court instructed the jury that the government did not have to show that the *quid pro quo* was explicit, or even that the targeted public officials had accepted Mr. Ring's gifts, to prove its case.

The D.C. Circuit upheld the district court's instructions, noting that the government can meet its burden of proof by showing the existence of an implicit *quid pro quo* when the "thing of value" being offered is something other than a campaign contribution. The court distinguished campaign contributions from other "things of value" provided by lobbyists, noting that while contributions implicate First Amendment concerns, "the First Amendment interest in giving hockey tickets to public officials is ... de minimis." Thus, whereas a prosecution predicated on campaign contributions would require proof of an explicit *quid pro quo* to quell constitutional concerns, the government can prove a case based on other gifts from lobbyists without proof of an explicit agreement.

Further, the court held, the government need not prove that the targeted public official actually accepted the implicit *quid pro quo*, for the offeror is guilty of honest services fraud as soon as he makes an offer intending to receive an official act in return. The court reasoned that because bribery

does not require agreement or completion of a corrupt exchange, nor can honest services fraud following *Skilling*.

The court's ruling adds contour to the post-*Skilling* landscape, particularly as it concerns lobbying activities. Lobbyists should take care when providing gifts to public officials in any context. While providing gifts to curry political goodwill is not illegal in and of itself, legal lobbying can turn criminal when the gift is linked to an intent to influence official acts—even absent an explicit agreement and/or completion of the exchange.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- D. Grayson Yeargin at [gyeargin@nixonpeabody.com](mailto:gyeargin@nixonpeabody.com) or (202) 585-8273
- Emily Crandall Harlan at [eharlan@nixonpeabody.com](mailto:eharlan@nixonpeabody.com) or (202) 585-8217
- Anthony Chavez at [achavez@nixonpeabody.com](mailto:achavez@nixonpeabody.com) or (213) 629-6034